

Supreme Court, U.S.

F I L E D

OCT 17 1970

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

NO. 869

ROLFE CHRISTOPHER and GARY CHRISTOPHER,
Petitioners

v.

E. I. duPONT deNEMOURS & COMPANY, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS, FIFTH CIRCUIT

ORGAIN, BELL & TUCKER
CARLTON THOMAS NORMAND
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October 16, 1970

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Regulations Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	6
Appendix A (Opinion of the U. S. Court of Appeals, Fifth Circuit)	9
Appendix B (Opinion of the U. S. Court of Appeals, on Petition for Rehearing)	19
Appendix C (Order of the U. S. District Court for the Eastern District of Texas)	20
Appendix D (General Operating and Flight Rules F.A.A. §91.79)	22

CASE CITATIONS

<i>Brown v. Fowler</i> , Tex. Civ. App. 1958, 316 S.W. 2d 111, writ ref'd n.r.e.	5
<i>K & G Tool and Service Co. v. G & G Fishing Tool Service</i> , 158 Tex. 594, 314 S.W.2d 783	5
<i>Thompson v. Smith</i> , 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930)	4
<i>Traux v. Raich</i> , 239 U.S. 33, 36 S.Ct. 7, 60 L. Ed. 131 (1915)	4
<i>United States v. Causby</i> , 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946)	4

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E. I. duPONT deNEMOURS & COMPANY, INC.,
Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS, FIFTH CIRCUIT**

Petitioners, Rolfe Christopher and Gary Christopher, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on July 20, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, as yet unreported, appears at Appendix A, *infra*, p. 9. A petition for rehearing was duly filed and denied in a *per curiam* opinion dated August 25, 1970, appearing at Appendix B, *infra*, p. 19. The order of the United States District Court, Eastern District of Texas, Beaumont Division, entered June 5, 1969, appears at Appendix C, *infra*, p. 20.

JURISDICTION

The order or judgment of the United States Court of Appeals, Fifth Circuit, was entered on July 20, 1970. Petition for rehearing was denied on August 25, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether petitioners' use of the public air space for aerial photography of construction at respondent's plant is an activity which can be enjoined or gives rise to a cause of action for damages.

REGULATIONS INVOLVED

This case involves §91.79 of the General Operating and Flight Rules of the F.A.A. These provisions are reprinted in pertinent part in Appendix D, *infra*, p. 22

STATEMENT OF THE CASE

Petitioners are photographers conducting their business in Beaumont, Texas. In March, 1969, petitioners were hired to take aerial photographs of construction at a plant owned by respondent and located near Beaumont, Texas. Subsequently, petitioners took aerial photographs of respondent's plant while flying in the public air space at an altitude greater than the minimum safe altitude of flight as defined by regulations of the F.A.A. These photographs were subsequently delivered by petitioners to their clients. After suit was commenced the pictures were delivered to respondent and are in their possession.

Respondent brought suit in the United States District Court of the Eastern District of Texas, invoking that

Court's jurisdiction on the grounds of diversity of citizenship. Respondent alleged that petitioners had wrongfully obtained photographs for an undisclosed third party revealing respondent's trade secrets. Recovery of damages for losses already sustained was sought, as well as temporary and permanent injunctions prohibiting any circulations of the photographs and prohibiting any further photographing of respondent's plant. Petitioners answered with motions to dismiss for lack of jurisdiction and failure to state a cause upon which relief could be granted. Depositions were taken during which petitioners refused to disclose the name of their client. Respondent filed a motion to compel an answer. Petitioners filed a motion for summary judgment. The trial court denied petitioners' motion to dismiss and for summary judgment, and granted respondent's motion to compel petitioners to divulge the name of their client.

The trial court entered a stay order and allowed an interlocutory appeal to the United States Court of Appeals, Fifth Circuit, on the ground that the trial court's rulings involved a controlling question of law as to which substantial ground for difference of opinion existed and that immediate appeal would materially advance the ultimate termination of the litigation.

The Fifth Circuit affirmed the decision of the trial court in an opinion dated July 20, 1970, remanding the case for further proceedings.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals, Fifth Circuit, involves important and vital questions of local and national law. This decision destroys petitioner's liberty to use the public air space and freedom to prac-

tice their profession in a lawful manner. It is a ruling affecting the right of every citizen to use the public space. The decision conflicts with the applicable law of Texas and with the principles set forth in decisions of the United States Supreme Court.

In holding that aerial photography, from whatever altitude, is an improper method of discovering alleged trade secrets, the Fifth Circuit reached a decision which destroys the individual's freedom to use public air space and to practice his profession in a lawful manner.

The court may have been rightfully concerned with protecting respondent's trade secrets; however, to achieve such a result by holding that legal aerial photography is "improper means" places undue emphasis upon commercial advantage at the expense of the individual's fundamental freedoms and liberties.

There can be no doubt that petitioners were exercising basic and fundamental rights while engaged in the activities of which respondent complains. The right to work for a living in the common occupations of the community is of the very essence of personal freedom and opportunity. *Traux v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). "The right of a citizen to travel upon the public highways and to transport his property thereon in the ordinary course of life and business is a common right which he has under his right to enjoy life and liberty, to acquire and possess property, and to pursue happiness and safety." *Thompson v. Smith*, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930). In the light of *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), the citizen's rights in this respect extend to the public air space above the minimum safe altitude of flight as set by the applicable federal regulatory agency.

Measured against these unquestioned rights, respondent seeks to protect its commercial advantage of an alleged "trade secret" by enjoining petitioners' activity and recovering damages. Petitioners' activities are characterized as "improper means" of discovering the trade secret.

Petitioners agree that trade secrets are entitled to reasonable protection. However, such protection is not automatic merely because the trade secret exists. The Fifth Circuit apparently holds that an otherwise lawful activity amounts to an "improper means" of discovery whenever the holder of the trade secret does not prevent detection of the trade secret from the means employed by the discoverer. Such an approach focuses on the difficulty of preventing detection rather than on the unlawfulness *vel non* of the means employed.

It is submitted that the proper test is whether or not the means used to discover the trade secret are "improper". If the trade secret is subject to discovery by persons engaged in lawful conduct, it is not a "secret" and it deserves no protection. Certainly this is the rationale announced by the Texas courts in *K & C Tool and Service Co. v. G & G Fishing Tool Service*, 158 Tex. 594, 314 S.W.2d 783 and *Brown v. Fowler*, Tex.Civ.App. 1958, 316 S.W.2d 111, *writ ref'd n.r.e.*, wherein the courts would allow discovery of trade secrets by experimentation, reverse engineering, etc. In such situations, a competitor in the pursuit of lawful and protected activities discovers the secret; discovery of the trade secret cannot be prevented by its holder; therefore the protection ceases. A similar result should be reached in the instant case. Even if respondent could not have prevented detection of its trade secret, this fact alone should not be sufficient to convert petitioners' lawful attempts to discover

the secret into "improper means" of discovery. Some other factor such as trespass, breach of confidential relationship, fraudulent conduct or illegality must be present before the discoverers' conduct becomes actionable.

If allowed to stand, the decision in the present case will award protection to a "trade secret" under circumstances where its detection was not protected (it could have been camouflaged) from those engaged in lawful conduct. Commercial advantage and expediency will become paramount, and the personal freedom and liberty of individuals to use the public air space and to enjoy their occupation will become secondary.

The problems presented in this case are apparently questions of first impressions in the United States. This Court should not sanction a situation in which inability to protect a trade secret from lawful acts of discovery converts otherwise lawful and protected activities into actionable wrongs.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,

ORGAIN, BELL & TUCKER
Beaumont Savings Building
Beaumont, Texas

By: *Carlton Thomas Normand*
CARLTON THOMAS NORMAND
DAVID J. KREAGER
Counsel for Petitioners

October 16, 1970

CERTIFICATE OF SERVICE

I, Carlton Thomas Normand, one of the attorneys for petitioners, do hereby certify that I am admitted to practice before the Supreme Court of the United States; that all parties required to be served in this matter have been served; and that service was accomplished by depositing three copies of this Application for Writ of Certiorari in a United States Post Office, with first class postage prepaid, addressed to counsel for respondent, Mr. Robert Q. Keith, Mehaffy, Weber, Keith & Gonsoulin, 1400 San Jacinto Building, Beaumont, Texas, 77701, on this the 16th day of October, 1970.

Carlton Thomas Normand
CARLTON THOMAS NORMAND

APPENDIX A

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 28254

E. I. duPONT deNEMOURS & COMPANY, INC.,
Plaintiff-Appellee,
versus
ROLFE CHRISTOPHER, ET AL.,
Defendants-Appellants.

*Appeal from the United States District Court for the
Eastern District of Texas*

(July 20, 1970)

Before WISDOM, GOLDBERG and INGRAHAM,
Circuit Judges.

GOLDBERG, Circuit Judge: This is a case of industrial espionage in which an airplane is the cloak and a camera the dagger. The defendants-appellants, Rolfe and Gary Christopher, are photographers in Beaumont, Texas. The Christophers were hired by an unknown third party to take aerial photographs of new construction at the Beaumont plant of E. I. duPont deNemours & Company,

Inc. Sixteen photographs of the DuPont facility were taken from the air on March 19, 1969, and these photographs were later developed and delivered to the third party.

DuPont employees apparently noticed the airplane on March 19 and immediately began an investigation to determine why the craft was circling over the plant. By that afternoon the investigation had disclosed that the craft was involved in a photographic expedition and that the Christophers were the photographers. DuPont contacted the Christophers that same afternoon and asked them to reveal the name of the person or corporation requesting the photographs. The Christophers refused to disclose this information, giving as their reason the client's desire to remain anonymous.

Having reached a dead end in the investigation, DuPont subsequently filed suit against the Christophers, alleging that the Christophers had wrongfully obtained photographs revealing DuPont's trade secrets which they then sold to the undisclosed third party. DuPont contended that it had developed a highly secret but unpatented process for producing methanol, a process which gave DuPont a competitive advantage over other producers. This process, DuPont alleged, was a trade secret developed after much expensive and time-consuming research, and a secret which the company had taken special precautions to safeguard. The area photographed by the Christophers was the plant designed to produce methanol by this secret process, and because the plant was still under construction parts of the process were exposed to view from directly above the construction area. Photographs of that area, DuPont alleged, would enable a skilled person to deduce the secret process for making methanol. DuPont thus contended that the Christophers

had wrongfully appropriated DuPont trade secrets by taking the photographs and delivering them to the undisclosed third party. In its suit DuPont asked for damages to cover the loss it had already sustained as a result of the wrongful disclosure of the trade secret and sought temporary and permanent injunctions prohibiting any further circulation of the photographs already taken and prohibiting any additional photographing of the methanol plant.

The Christophers answered with motions to dismiss for lack of jurisdiction and failure to state a claim upon which relief could be granted. Depositions were taken during which the Christophers again refused to disclose the name of the person to whom they had delivered the photographs. DuPont then filed a motion to compel an answer to this question and all related questions.

On June 5, 1969, the trial court held a hearing on all pending motions and an additional motion by the Christophers for summary judgment. The court denied the Christophers' motions to dismiss for want of jurisdiction and failure to state a claim and also denied their motion for summary judgment. The court granted DuPont's motion to compel the Christophers to divulge the name of their client. Having made these rulings, the court then granted the Christophers' motion for an interlocutory appeal under 28 U.S.C.A. § 1292(b) to allow the Christophers to obtain immediate appellate review of the court's finding that DuPont had stated a claim upon which relief could be granted. Agreeing with the trial court's determination that DuPont had stated a valid claim, we affirm the decision of that court.

This is a case of first impression, for the Texas courts have not faced this precise factual issue, and sitting as a diversity court we must sensitize our *Erie* antennae to

divine what the Texas courts would do if such a situation were presented to them. The only question involved in this interlocutory appeal is whether DuPont has asserted a claim upon which relief can be granted. The Christophers argued both at trial and before this court that they committed no "actionable wrong" in photographing the DuPont facility and passing these photographs on to their client because they conducted all of their activities in public airspace, violated no government aviation standard, did not breach any confidential relation, and did not engage in any fraudulent or illegal conduct. In short, the Christophers argue that for an appropriation of trade secrets to be wrongful there must be a trespass, other illegal conduct, or breach of a confidential relationship. We disagree.

It is true, as the Christophers assert, that the previous trade secret cases have contained one or more of these elements. However, we do not think that the Texas courts would limit the trade secret protection exclusively to these elements. On the contrary, in *Hyde Corporation v. Huffines*, Tex. 1958, 314 S.W.2d 763, the Texas Supreme Court specifically adopted the rule found in the Restatement of Torts which provides:

"One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if

- (a) he discovered the secret by improper means, or
- (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him. . . ."

Restatement of Torts § 757 (1939).

Thus, although the previous cases have dealt with a breach of a confidential relationship, a trespass, or other

illegal conduct, the rule is much broader than the cases heretofore encountered. Not limiting itself to specific wrongs, Texas adopted subsection (a) of the Restatement which recognizes a cause of action for the discovery of a trade secret by any "improper" means.

The defendants, however, read *Furr's Inc. v. United Specialty Advertising Co.*, Tex. Civ. App. 1960, 338 S.W.2d 762, *writ ref'd n.r.e.*, as limiting the Texas rule to a breach of a confidential relationship. The court in *Furr's* did make the statement that

"The use of someone else's idea is not automatically a violation of the law. It must be something that meets the requirements of a 'trade secret' *and has been obtained through a breach of confidence* in order to entitle the injured party to damages and/or injunction. 338 S.W.2d at 766." (emphasis added)

We think, however, that the exclusive rule which defendants have extracted from this statement is unwarranted. In the first place, in *Furr's* the court specifically found that there was no trade secret involved because the entire advertising scheme claimed to be the trade secret had been completely divulged to the public. Secondly, the court found that the plaintiff in the course of selling the scheme to the defendant had voluntarily divulged the entire scheme. Thus the court was dealing only with a possible breach of confidence concerning a properly discovered secret; there was never a question of any impropriety in the discovery or any other improper conduct on the part of the defendant. The court merely held that under those circumstances the defendant had not acted improperly if no breach of confidence occurred. We do not read *Furr's* as limiting the trade secret protection to a breach of confidential relationship when the facts of

the case do raise the issue of some other wrongful conduct on the part of one discovering the trade secrets of another. If breach of confidence were meant to encompass the entire panoply of commercial improprieties, subsection (a) of the Restatement would be either surplusage or persiflage, an interpretation abhorrent to the traditional precision of the Restatement. We therefore find meaning in subsection (a) and think that the Texas Supreme Court clearly indicated by its adoption that there is a cause of action for the discovery of a trade secret by any "improper means." *Hyde Corporation v. Huffines, supra*.

The question remaining, therefore, is whether aerial photography of plant construction is an improper means of obtaining another's trade secret. We conclude that it is and that the Texas courts would so hold. The Supreme Court of that state has declared that "the undoubted tendency of the law has been to recognize and enforce higher standards of commercial morality in the business world." *Hyde Corporation v. Huffines, supra* at 773. That court has quoted with approval articles indicating that the *proper* means of gaining possession of a competitor's secret process is "through inspection and analysis" of the product in order to create a duplicate. *K & G Tool & Service Co. v. G & G Fishing Tool Service*, Tex. 1958, 314 S.W.2d 783, 788. Later another Texas court explained:

"The means by which the discovery is made may be obvious, and the experimentation leading from known factors to presently unknown results may be simple and lying in the public domain. But these facts do not destroy the value of the discovery and will not advantage a competitor who by unfair means ob-

tains the knowledge *without paying the price expended by the discoverer.*" Brown v. Fowler, Tex. Civ. App. 1958, 316 S.W.2d 111, 114, writ ref'd n.r.e., (emphasis added).

We think, therefore, that the Texas rule is clear. One may use his competitor's secret process if he discovers the process by reverse engineering applied to the finished product; one may use a competitor's process if he discovers it by his own independent research; but one may not avoid these labors by taking the process from the discoverer without his permission at a time when he is taking reasonable precautions to maintain its secrecy. To obtain knowledge of a process without spending the time and money to discover it independently is *improper* unless the holder voluntarily discloses it or fails to take reasonable precautions to ensure its secrecy.

In the instant case the Christophers deliberately flew over the DuPont plant to get pictures of a process which DuPont had attempted to keep secret. The Christophers delivered their pictures to a third party who was certainly aware of the means by which they had been acquired and who may be planning to use the information contained therein to manufacture methanol by the DuPont process. The third party has a right to use this process only if he obtains this knowledge through his own research efforts, but thus far all information indicates that the third party has gained this knowledge solely by taking it from DuPont at a time when DuPont was making reasonable efforts to preserve its secrecy. In such a situation DuPont has a valid cause of action to prohibit the Christophers from improperly discovering its trade secret and to prohibit the undisclosed third party from using the improperly obtained information.

We note that this view is in perfect accord with the position taken by the authors of the Restatement. In commenting on improper means of discovery the savants of the Restatement said:

“f. *Improper means of discovery.* The discovery of another’s trade secret by improper means subjects the actor to liability independently of the harm to the interest in the secret. Thus, if one uses physical force to take a secret formula from another’s pocket, or breaks into another’s office to steal the formula, his conduct is wrongful and subjects him to liability apart from the rule stated in this Section. Such conduct is also an improper means of procuring the secret under this rule. But means may be improper under this rule even though they do not cause any other harm than that to the interest in the trade secret. Examples of such means are fraudulent misrepresentations to induce disclosure, tapping of telephone wires, eavesdropping or other espionage. A catalogue of improper means is not possible. In general they are means which fall below the generally accepted standards of commercial morality and reasonable conduct.” Restatement of Torts § 757, comment f at 10 (1939).

In taking this position we realize that industrial espionage of the sort here perpetrated has become a popular sport in some segments of our industrial community. However, our devotion to free wheeling industrial competition must not force us into accepting the law of the jungle as the standard of morality expected in our commercial relations. Our tolerance of the espionage game must cease when the protections required to prevent another’s spying cost so much that the spirit of inventiveness is dampened. Commercial privacy must be protected from espionage which could not have been reasonably

anticipated or prevented. We do not mean to imply, however, that everything not in plain view is within the protected vale, nor that all information obtained through every extra optical extension is forbidden. Indeed, for our industrial competition to remain healthy there must be breathing room for observing a competing industrialist. A competitor can and must shop his competition for pricing and examine his products for quality, components, and methods of manufacture. Perhaps ordinary fences and roofs must be built to shut out incursive eyes, but we need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable methods of espionage now available.

In the instant case DuPont was in the midst of constructing a plant. Although after construction the finished plant would have protected much of the process from view, during the period of construction the trade secret was exposed to view from the air. To require DuPont to put a roof over the unfinished plant to guard its secret would impose an enormous expense to prevent nothing more than a school boy's trick. We introduce here no new or radical ethic since our ethos has never given moral sanction to piracy. The market place must not deviate far from our mores. We should not require a person or corporation to take unreasonable precautions to prevent another from doing that which he ought not to do in the first place. Reasonable precautions against predatory eyes we may require, but an impenetrable fortress is an unreasonable requirement, and we are not disposed to burden industrial inventors with such a duty in order to protect the fruits of their efforts. "Improper" will always be a word of many nuances, determined by time, place, and circumstances. We therefore need not proclaim a

catalogue of commercial improprieties. Clearly, however, one of its commandments does say "thou shall not appropriate a trade secret through deviousness under circumstances in which countervailing defenses are not reasonably available."

Having concluded that aerial photography, from whatever altitude, is an improper method of discovering the trade secrets exposed during construction of the DuPont plant, we need not worry about whether the flight pattern chosen by the Christophers violated any federal aviation regulations. Regardless of whether the flight was legal or illegal in that sense, the espionage was an improper means of discovering DuPont's trade secret.

The decision of the trial court is affirmed and the case remanded to that court for proceedings on the merits.

APPENDIX B

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 28254

E. I. duPONT deNEMOURS & COMPANY, INC.,
Plaintiff-Appellee,

versus

ROLFE CHRISTOPHER, ET AL.,
Defendants-Appellants.

*Appeal from the United States District Court for the
Eastern District of Texas*

*ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC*

(August 25, 1970)

Before WISDOM, GOLDBERG and INGRAHAM,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. 6258

E. I. duPONT deNEMOURS & COMPANY, INC.

versus

ROLFE CHRISTOPHER AND GARY CHRISTOPHER

O R D E R

BE IT REMEMBERED that on this date in the above case came on to be heard Defendants' Motion to Dismiss for lack of jurisdiction and Motion to Dismiss for failure to state a claim upon which relief can be granted; and Motion for Summary Judgment and Plaintiff's Motion to require answer to certain questions relating to the identity of the person, firm, or corporation who employed Defendants. Having considered all of said Motions, together with affidavits and depositions on file herein, it is ORDERED as follows:

1. Defendants' Motion to Dismiss for lack of jurisdiction is overruled;
2. Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted is overruled;
3. Defendants' Motion for Summary Judgment is overruled;

4. Plaintiff's Motion to compel answer to questions on depositions relating to the identity and location of the firm, person or corporation who employed Defendants to take photographs of Plaintiff's Methanol Plant at its Beaumont works and to whom he delivered said photographs is sustained;

5. Having made such rulings, and having considered the motion for Interlocutory appeal filed by Defendants, it is also ORDERED that the above orders of this Court involve a controlling question of law as to which there is substantial ground for differences of opinion and that an immediate appeal from the order will materially advance the ultimate disposition of the litigation here involved.

A prompt decision by the Appellate Court at this stage would serve the cause of justice by accelerating the ultimate termination of this litigation by settlement or otherwise.

Therefore, Defendants are GRANTED leave to file application for appeal to the Court of Appeals, and proceedings in this Court are stayed until termination thereof.

SIGNED AND ENTERED this the 5th day of June, 1969.

JOE J. FISHER
Judge Presiding

APPENDIX D

GENERAL OPERATING AND FLIGHT RULES

“§91.79 Minimum safe altitudes; general.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) *Helicopters.* Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the Administrator.”

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ROLFE CHRISTOPHER, ET AL, *Petitioners*

v.

E. I. duPONT deNEMOURS & COMPANY, INC.,
Respondent

REPLY TO PETITION FOR
WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Argument	4
Conclusion	6
Appendix	9

LIST OF AUTHORITIES

CASES	Page
Brown v. Fowler, 316 S.W.2d 111 (Tex. Civ. App. 1958, error ref. n.r.e.)	3
Hyde Corp. v. Huffines, 314 S.W.2d 763 (Tex. Sup. 1958)	3
United States v. Causby, 328 U.S. 256 (1946)	5

UNITED STATES STATUTES	
28 U.S.C. §1254(1)	1
28 U.S.C. §1292(b)	1
49 U.S.C. §1301	5
49 U.S.C. §1304	5

FEDERAL RULES OF CIVIL PROCEDURE	
Rule 26(b)	2

CODE OF FEDERAL REGULATIONS	
Title 14, Chp. 1, Sec. 1.1	5, 9
Title 14, Chp. 1, Sec. 91.79	4, 9
Title 14, Chp. 1, Sec. 91.85	9

IN THE
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NO. 869

ROLFE CHRISTOPHER, ET AL, *Petitioners*

v.

E. I. duPONT deNEMOURS & COMPANY, INC.,
Respondent

**REPLY TO PETITION FOR
WRIT OF CERTIORARI**

To The Supreme Court Of The United States:

Respondent, E. I. duPont deNemours & Company, Inc., respectfully prays that the Petition for Writ of Certiorari in this matter be in all things denied.

JURISDICTION

The trial court's jurisdiction rested on diversity of citizenship, the Court of Appeals on 28 U.S.C. §1292(b). This Court's jurisdiction may be invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an owner of land has a cause of action against an aerial photographer deliberately circling above the owner's land to photograph trade secrets of the owner who has exercised reasonable care to protect such trade secrets from discovery.

2. Whether the Court of Appeals correctly affirmed the trial court's denial of Petitioners' Motion for Summary Judgment, and Motion to Dismiss, and correctly remanded the case for further proceedings upon the merits.

STATEMENT OF THE CASE

This lawsuit arises out of Petitioners taking and delivering to an undisclosed third party aerial photographs disclosing Respondent's trade secrets respecting the commercial manufacture of methanol. After Respondent filed its complaint, and before Petitioners filed an answer, oral depositions were taken of the Petitioners, who refused to answer questions relating to the "identity and location" of the persons or firms who engaged them to take these aerial photographs, and to whom they delivered the pictures when printed. The trial court ordered Petitioners to answer such questions under Rule 26(b), Fed. Rules Civ. Proc., and overruled Petitioners' Motion to Dismiss and Motion for Summary Judgment.

Respondent has not yet answered the complaint in the trial court. There has been no trial and the trial court has not made any findings of fact or entered any final order.

The Court of Appeals affirmed the interlocutory order directing further discovery and denying the Motions to

Dismiss and for Summary Judgment, and remanded the case for further proceedings in the trial court.

Respondent exercised extreme caution in the protection of its trade secrets which were being embodied in the construction of a new methanol manufacturing facility near Beaumont, Texas. Discovery of these trade secrets could only be had by aerial photography. Petitioners hired an airplane, circled several times over Respondent's plant site at an altitude of about 500 feet, photographed the trade secrets, developed the films and delivered the prints to the undisclosed principal who had employed them to make the photographs in question.

Suit was brought to recover the photographs, for injunctive relief, and for damages from the acquisition and publication of Respondent's trade secrets. One of the Petitioners acknowledged that they refused to disclose the identity of their principal upon deposition only because he "doesn't want me to reveal it". The undisclosed principal agreed "to take care of" the expense of the litigation.

Consonant with the Restatement of the Law of Torts, Sections 757 and 759, and analogous Texas cases, *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. Sup. 1958); *Brown v. Fowler*, 316 S.W.2d 111 (Tex. Civ. App. 1958, error ref. n.r.e.), on appeal from the trial court's interlocutory order, the Court of Appeals held, on a test of the complaint against the Motion to Dismiss, that the acquisition of a trade secret by aerial photography was "improper" within the meaning of the Restatement and that a cause of action lies therefor.

ARGUMENT

However cast, at this stage of the proceeding, we are dealing with a case:

- (1) of diversity jurisdiction;
- (2) where review is sought of an interlocutory order compelling discovery and denying a motion for summary judgment and to dismiss a complaint;
- (3) wherein there is no asserted conflict with a state decision, state law, a federal decision or federal law;
- (4) wherein Petitioners do not even assert the rudimentary bases for the granting of a petition for certiorari under this Court's Rule 19(1)(b).

Even though there has been no finding in this respect, Petitioners contend the photographs were taken from the "public air space", "at an altitude greater than minimum safe altitude of flight as defined by regulations of the F.A.A." (Page 2 of Petition).

This was a rigorously disputed fact issue rendered immaterial by the Court of Appeals. However, there is ample proof by affidavit and deposition that the flight was at an altitude of 500 to 800 feet over an area wherein there were structures 100 to 300 feet in height, 1000 people working and "literally hundreds" of automobiles parked. Any one of these conditions would render the flight violative of the F.A.A. regulation Sec. 91.79, General Operating and Flight Rules to which Petitioners refer, and deprive Petitioners of their claimed right of transit over Respondent's property.

Furthermore, Respondent's plant site is within a five-mile radius of the Jefferson County Airport, and within the "airport traffic area" (A. 210).¹ Yet, there is nothing other than hearsay testimony on discovery proceedings that permission for this flight had been granted by the Tower Control at Jefferson County Airport.² Title 14, Chapter 1, Section 1.1, and Section 91.84, Code of Federal Regulations, prohibits such flight without prior permission of "air traffic control". See Appendix hereto.

Whether the photographs in fact were or were not taken from within the public air space is subject to resolution on a trial of this matter.

Petitioners contend "This decision destroys Petitioners' liberty to use the public air space and freedom to practice their profession in a lawful manner. It is a ruling affecting the right of every citizen to use the public space". (Pages 3-4 of Petition).

In truth, the Court will note that while there is defined navigable air space (49 U.S.C. §1301), the Congressional declaration enunciates for United States citizens³ only a "public right of freedom of transit" therein. 49 U.S.C. §1304. Likewise, this Court in *United States v. Causby*, 328 U.S. 256 (1946) referred to this navigable

1. "Airport traffic area" means, * * * that air space within a horizontal radius of 5 statute miles from the geographical center of any airport at which a control tower is operating, extending from the surface up to but not including 2000 feet above the surface. Title 14, Chap. 1, Sec. 1.1, C.F.R.

2. This issue is still unresolved because all discovery proceedings were stayed by the trial court pending interlocutory appeal.

3. In this immature record, there is no showing plaintiffs are citizens.

air space as a "public highway" for "flight", saying nothing about its use for the surreptitious appropriation of trade secrets.

Petitioners are not denied freedom of transit, the liberty to use the air space or the opportunity to practice their profession in a lawful manner. By the decision below, after the matter is finally tried, they may be circumscribed in their "improper" acquisition and disclosure of trade secrets. This holding follows precisely the Restatement of Torts, and is consonant with the Texas Courts observations:

"* * * the undoubted tendency of the law has been to recognize and enforce higher standards of commercial morality in the business world". *Hyde v. Huffines*, 314 S.W.2d 763, 773 (Tex. Sup. 1958).

"The fact that (a trade secret) may be discovered by fair means does not deprive the owner of his right to protection from one who secures the knowledge by unfair means. The question is not, 'How could he have secured the knowledge?', but, 'How did he?' ". *Brown v. Fowler*, 315 S.W.2d 111, 114 (Tex. Civ. App. 1958, error ref. n.r.e.).

Section 759 of the Restatement of Torts says:

"One who, for the purpose of advancing a rival business interest, procures by *improper means* information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information".

Whether to prevent unjust enrichment⁴ or the fruits of

4. *Meier Glass Co. v. Anchor Hocking Glass Corp.*, 94 F.Supp. 264, 268 (W.D. Penn. 1951).

“intrusion”,⁵ the Court of Appeals did not allow the surreptitious expropriator of a trade secret to be insulated from liability,⁶ declaring that aerial photography of such secrets was “improper” and that a cause of action lies therefor.

CONCLUSION

Since this is a correct decision upon an interlocutory order in conflict with none other, Respondent prays that the Petition for Certiorari be in all things denied, whereupon a trial may be had.

Respectfully submitted,

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5. Prosser, *Privacy*, 48 Calif. Law Rev. 383, 389-392 (1960).

6. *Seismograph Service Corp. v. Offshore Raydist.*, 135 F.Supp. 342, 354 (E.D. La. 1955).

APPENDIX

Title 14, Chp. 1, Sec. 1.1, C.F.R.:

“‘Airport traffic area’ means, unless otherwise specifically designated in Part 93, that airspace within a horizontal radius of 5 statute miles from the geographical center of any airport at which a control tower is operating extending from the surface up to, but not including, 2,000 feet above the surface.”

Title 14, Chp. 1, Sec. 91.79, C.F.R.:

“§91.79 Minimum safe altitudes; general.

“Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

“(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

“(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

“(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.”

Title 14, Chp. 1, Sec. 91.85, C.F.R.:

§91.85 Operating on or in the vicinity of an airport; general rules.

“(a) Unless otherwise required by Part 93 of this chapter, each person operating an aircraft on or in

the vicinity of an airport shall comply with the requirements of this section and of §§91.87 and 91.89.

“(b) Unless otherwise authorized or required by ATC, no person may operate an aircraft within an airport traffic area except for the purpose of landing at or taking off from, an airport within that area. ATC authorizations may be given as individual approval of specific operations or may be contained in written agreements between airport users and the tower concerned.”

Supreme Court, U.S.
F I L E D

FEB 18 1971

E. ROBERT SEAVER, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

594

NO. 869

ROLFE CHRISTOPHER and GARY CHRISTOPHER,
Petitioners

V.

E.I. duPONT deNEMOURS & COMPANY, INC.
Respondent

PETITION FOR REHEARING OF ORDER
DENYING CERTIORARI

ORGAIN, BELL & TUCKER
Carlton Thomas Normand
David J. Kreager
Beaumont Savings Building
Beaumont, Texas

February 17, 1971

Counsel for Petitioners

INDEX

	Page
Reasons for Granting Rehearing	2
Conclusion.....	10
Appendix A (Editorial, <u>Beaumont Enterprise</u> , January 11, 1971).....	12

CASE CITATIONS

Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348 (9th Cir. 1964, cert.den. 379 U.S. 989).....	6
Columbia Broadcasting System, Inc. v. DeCosta, 377 F.2d 315 (1st Cir. 1967, cert.den. 389 U.S. 1007).....	7
Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669 (1964).....	5
Duplex Straw Dispenser Co. v. Harold Leonard & Co., 229 F.Sup. 401 (U.S.D.C. Cal. 1964).....	6
Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661 (1964).....	5
Servo Corp. of America v. General Electric Co., 337 F.2d 716 (4th Cir. 1964).....	8
Sports & General Press Agency, Ltd. v. "Our Dogs" Publishing Co., 2 K.B. 880 (1916).....	3
Swetland v. Curtiss Airports Corp., 41 F.2d 929 (U.S.D.C. Ohio 1930) modified 55 F.2d 201 (6th Cir. 1921).....	3

Tappan Company v. General Motors Corp., 380 F.2d 888 (6th Cir. 1967).....	8
Titlelock Carpet Strip Co. v. Klasner, 142 U.S. P.Q. 405 (Cal.Super. 1964).....	7
United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (U.S.D.C. Ohio 1930)	2
Waters Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163 (5th Cir. 1969).....	8

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V.

E. I. duPONT deNEMOURS & COMPANY, INC.

. . . Respondent

PETITION FOR REHEARING OF ORDER
DENYING CERTIORARI

Petitioners respectfully request that the Court grant rehearing of its order dated January 25, 1971, which denied certiorari, and that the Court now grant petitioners' application for certiorari.

REASONS FOR GRANTING REHEARING

The petition for certiorari presents the question whether petitioners as individuals in the profession of photography have the freedom to use the public airspace for aerial photography of construction at respondent's plant. Technically the question is presented in the form of a motion for summary judgment that such an activity does not give rise to a cause of action against the photographer.

Petitioners respectfully submit that the Court of Appeals for the Fifth Circuit erred in giving judicial protection to respondent's trade secrets at the expense of petitioners' constitutional right to practice their profession of photography while flying through public air space. The lower court's decision erred in two respects. First, it results in an unreasonable restriction on petitioners' liberty as individuals, in deference to respondent's anti-competitive interest in its alleged trade secrets. Secondly, the decision grants respondent a practical monopoly through judicial enforcement of a state-created right, notwithstanding the fact that respondent's non-patented process was not entitled to the legal monopoly afforded by compliance with federal patent law.

I. CONSTITUTIONAL LIBERTY TO USE PUBLIC AIRSPACE

The Fifth Circuit opinion assumes that petitioners' activities were carried out in public air space, yet expressly fails to recognize that petitioners have a right to practice their profession and to utilize the public air space. United States v. Causby, 328

U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). See also Swetland v. Curtiss Airports Corp., 41 F.2d 929 (U.S.D.C. Ohio 1930) modified 55 F.2d 201 (6th Cir. 1932) where the court emphasized that it is the right of the public to use the atmospheric space above the earth's surface, whether it be to fly a kite, send messenger pigeons, or ascend in an airplane. In that case, the court drew an interesting analogy to the public's right to use navigable waters, notwithstanding private "ownership."

It should be recognized that what petitioners had a right to see with their eyes, they should be entitled to record by camera. While no United States cases were discovered which clearly discuss the right of photography, the English case of Sport & General Press Agency, Ltd. v. "Our Dogs" Publishing Co., 2 K.B. 880 (1916) held that the plaintiff-landowner's right to restrict photography of activities conducted on his land was entirely incident to the right of excluding people from the property, and there was no right to prohibit the photography if the defendant had been on top of a house or in some position where he could photograph the activities without interfering with the physical property of the plaintiff.

The extent to which the public exercises these valuable rights cannot be definitely measured, but utilization of aerial photography for real estate development, geodetic services and meteorological purposes offer typical examples. A recent proposal by the Aircraft Owners and Pilots Association to use aerial photography to detect pollution also illustrates the degree to which the public asserts these individual liberties, see

Editorial, Beaumont Enterprise, January 11, 1971, Appendix A, *infra*, page 12.

As opposed to these well-recognized individual rights, the Fifth Circuit gave protection to respondent's interest in its non-patented trade secrets. In doing so, the Fifth Circuit did not even analyze or discuss the extent and nature of respondent's interest, despite the fact that the proceedings were largely equitable.

It is submitted that respondent's interest in its trade secrets is either non-existent or greatly subordinate to the rights of petitioners. Trade secret protection is intended to protect the developer from his competitors. However, by its very nature, the protection is non-competitive, allowing a developer to intentionally avoid public disclosure of valuable scientific and technical knowledge. The non-disclosure in turn results in wasteful duplication of research efforts, inefficient production, and prices established by a practical monopoly rather than by free competition.

Apparently the Fifth Circuit would hold that respondent's desire to maintain its "padlock" monopoly is a legitimate interest superior to the petitioners' freedom and right to the lawful exercise of their profession while flying through public air space. The balancing of these equities is admittedly a difficult task; yet the lower court, without any real consideration of the issue, has reached a conclusion in favor of a business interest which is essentially property-oriented and anti-competitive in nature, at the

expense of petitioners' well-recognized individual liberties.

It is submitted that recognized legal and equitable principles compel a contrary decision, and that the protection afforded to respondent is not reasonable when compared to the restriction that it places upon petitioners' individual liberties.

II. JUDICIALLY CREATED MONOPOLY OF NON-PATENTED PROCESS:

The Fifth Circuit, ostensibly in the enforcement of state law, grants respondent a judicial monopoly, notwithstanding the fact that the process was unpatented.

The Supreme Court has clearly held that some state-created protections of unpatented products are not enforceable in view of federal pre-emption of the field stemming from Art. 1, Section 8 of the Constitution. Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661, (1964) and Compco Corp. v. Day-Brite Lighting, Inc. 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed. 2d 669 (1964).

The Supreme Court in these decisions emphasizes Congressional intent, as expressed in the patent laws, to foster scientific knowledge and technical know-how through disclosure, while at the same time protecting the developer by the legal monopoly afforded in the patent laws. The rationale of the decisions seems to be that any unpatented product or process remains in the public domain, available to all, and that state-created restrictions on its use are invalid in view of the exclusive form of regulation and protection found in the federal

patent laws. The Court would thus indicate that, the legal monopoly created by the patent laws is exclusive, and that, a person who does not obtain such a patent should not be granted a practical monopoly through state-created injunctions or damage suits.

Lower courts have extended the doctrine to preclude judicially-created protection of non-patented items under state law. In Cable Vision, Inc. v. KUTV, Inc., 335 F. 2d 348 (9th Cir. 1964, cert.den. 379 U.S. 983) the Ninth Circuit reversed a lower court decision awarding a local television station relief under the Idaho law of unfair competition and interference with contract. The community antenna operator had intercepted television signals from distant stations and transmitted them simultaneously with the local television station. The court held that to grant state common law protection was to create what in essence was a copyright interest, and such a result would "enable the originator to accomplish with the left hand of state authority what he was unable to accomplish with the right hand bearing the authority of primary federal interest." The lower court decision was thus reversed for "creating", by judicial act and without Congressional authority, a new protectible interest beyond the protection afforded under federal law.

In Duplex Straw Dispenser Co. v. Harold Leonard & Co., 229 F.Supp. 401 (U.S.D.C. Cal. 1964) the plaintiff brought suit for patent infringement and unfair competition. A summary judgment was entered for the defendant in which the court held that Sears and Compco precluded a state cause of action for

unfair competition based on use of the invalidly patented item.

In Titleock Carpet Strip Co. v. Kiasner, 142 U.S. P.Q. 405 (Cal.Super. 1964) the defendant obtained parts to an unpatented machine by entering the owner's premises on the pretense of collecting scrap metal. The court held on the authority of Sears and Compco that even where the acquisition of the unpatented item was admittedly "wrongful", no relief was available under state law.

Based on these authorities, if state-created restrictions on the acquisition and use of respondent's non-patented process are constitutionally invalid, the United States District Court and the United States Court of Appeals for the Fifth Circuit should have granted petitioners' motion to dismiss for lack of jurisdiction in this diversity action. In the absence of such action by the lower courts, this Court should now grant the relief to which petitioners are entitled, either directly, or upon consideration of the question after granting certiorari.

Even if the Constitution tolerates some regulation over non-patented items which is not inconsistent with federal interest, it is respectfully submitted that the Supreme Court should now grant certiorari in this case to delineate the extent of state and judicial authority to impose such restrictions.

Among the various Courts of Appeal which have considered the problem, the First Circuit and the Sixth Circuit have applied the rationale in Columbia Broadcasting System, Inc. v.

DeCosta, 377 F.2d 315 (1st Cir. 1967, cert.den. 389 U.S. 1007) and Tappan Company v. General Motors Corp., 380 F.2d 888 (6th Cir. 1967). The Fourth Circuit in Servo Corp. of America v. General Electric Co., 337 F. 2d 716 (4th Cir. 1964) and the Fifth Circuit in Water Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163 (5th Cir. 1969) adopted a restricted interpretation of Sears and Compco. Petitioners do not assert that a definite conflict exists among the Circuits, due to the greatly varying fact situations and legal issues involved in the cited cases. Nonetheless, it is submitted that the Sears and Compco decisions are not receiving an altogether consistent interpretation by the lower courts.

In view of these considerations, it must be admitted that lower court decisions demonstrate a degree of uncertainty and confusion as to the extent and degree of protection available to non-patented items under state law. It is equally apparent that courts will continue to apply local concepts of property, contract and tort law, without regard to what is, or should be, the Constitutionally prescribed limits of state power over non-patented items.

In the present case, only local tort concepts were considered, to the end that respondent achieved a judicially created monopoly despite the absence of patent protection. To afford such protection based upon a court's interpretation of what activities constitute an "improper means" of discovery under local tort law appears to encourage a disjointed and divergent determination of such questions by numerous jurisdictions. The effect of such a situation upon federal patent policy is apparent

upon realization that the local law of one state may afford greater or lesser protection of trade secrets than found under the law of a sister state. Instead of a uniform and consistent federal patent law with clear-cut standards and well-defined national policies to achieve public disclosure and corresponding protection for the inventor, the extent and degree of protection afforded to a particular item may well depend upon the secrecy and non-disclosure achieved by the inventor, and the shifting concepts of local tort law as determined by a particular court, rather than by Congress.

The Fifth Circuit has made an Erie-educated guess as to the local tort law of Texas, and by its decision granted a practical monopoly to respondent, even in the absence of patent. The Court applies local law rather than Congressionally adopted patent law. In doing so, the Fifth Circuit not only applied the wrong choice of law; but also, the Court took over the Constitutional grant of exclusive power given Congress to determine the type of process entitled to protection, the degree of protection to be afforded, and the manner in which any such protection is to be enforced. All of this was incorporated by the Fifth Circuit's determination that use of photography in the public air space created a cause of action against the photographer because it was "improper means" of observing so-called "trade secrets".

It is submitted that the individual parties in this case are entitled to a complete review of their respective positions; but in addition, larger issues of federal-state and congressional-judicial relationships are involved.

The only questions presented are whether a cause of action is asserted against the photographers and whether the court can constitutionally provide protection under state law. The photographs and negatives were previously delivered to respondent. Petitioners by deposition on February 5, 1971, revealed the name of the party employing them to make the photographs.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

ORGAIN, BELL & TUCKER
Beaumont Savings Building
Beaumont, Texas

By: Carlton Thomas Normand
Carlton Thomas Normand
David J. Kreager

February 17, 1971

Attorneys for Petitioners

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

I further certify that all parties required to be served in this matter have been served and that service was accomplished by depositing three copies of this petition for rehearing in a United States Post Office, with first class postage prepaid, addressed to counsel for respondent, Mr. Robert Q. Keith, Mehaffy, Weber, Keith & Gonsoulin, 1400 San Jacinto Building, Beaumont, Texas 77701, on this the 17th day of February, 1971.

A handwritten signature in cursive script, reading "Carlton Thomas Normand", written over a horizontal line.

Carlton Thomas Normand

12
APPENDIX A

BEAUMONT ENTERPRISE

Monday, January 11, 1971

Pilot and Camera

" AN INTERESTING approach to discovering and bringing to public attention serious — but sometimes unwitting — contributors to air pollution has been offered by the Aircraft Owners and Pilots Association.

Its proposal is for the private airplane and the camera to join the battle. More than 158,000 pilots who are members of AOPA are being asked to photograph from the air obvious polluters and to send prints or slides of these photos to local or national pollution control authorities.

Air pollution has long been a concern and a problem for the private pilot. From sufficient altitude, where the air is clear and clean, he can look down on the blanket of dirt which covers most cities. He can see belching smokestacks and watch the trail of pollution spread over miles of cities and countryside.

This is reason enough for AOPA to urge members to take cameras along on flights and to photograph the plumes of smoke, record the date and time, and send the documents to local authorities. If the local authorities do not take action, the photographs would be forwarded to appropriate federal offices.

The program is not aimed at 'going after' any specific industry or polluter. Instead, the feeling is that many industrialists are not fully aware how much area is affected by just one smokestack and that when they see documented proof from above they will be eager to take corrective measures."